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No. 80-1640
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA, *Petitioners,*
v.
STEPHEN SHOLLY, *et al., Respondents.*
METROPOLITAN EDISON COMPANY, *et al., Petitioners,*
v.
PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent

[1] While the other parties have consented to the filing of this brief *amicus curiae,* respondents Stephen Sholly, *et al.,* have not consented to EEI's participation at this stage of the proceeding. The letters providing written consent have been filed with the Clerk of this Court.

of the nation's electricity users. EEI's members include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the Nuclear Regulatory Commission ("NRC") or for which applications for construction permits are pending.[2] In 1980 nuclear power plants produced 11 percent of the domestic electricity generated from all fuel sources by generating 251,122 million net kilowatt hours of electricity.[3] In 1979, the latest year for which figures are available, EEI member companies produced 83.7 percent, or 213,132 million net kilowatt hours, of the total nuclear power generated.[4]

As of December 31, 1979, 40,917,550 customers in 34 states were within the service areas of the EEI member utilities having operating nuclear plants and received direct benefits from the electricity they produced.[5] Customers in other areas and states received indirect benefits from these plants under regional interconnection agreements which, through regional transmission line grid systems, provide for the sale and purchase of electricity among participating utilities.

All 87 of the EEI members having an interest in operating or proposed nuclear power plants are impacted by and have an identifiable interest in the efficient and timely operation of the NRC licensing procedures. The decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals")

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[2] U.S. Nuclear Regulatory Commission, *Owners of Nuclear Power Plants,* NUREG-0327, Rev. 2 (December 1979).

[3] U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* 70 (March 1981).

[4] U.S. Nuclear Regulatory Commission, *Operating Units Status Report,* NUREG-0020, Vol. 4, No. 1 (January 1980).

[5] Edison Electric Institute, *Catalogue of Investor-Owned Electric Utility Companies Operating in the United States,* 20th Ed. (1981).

therefore involves matters of vital concern to EEI and its members. Because the interest of private electric utilities nationwide and of the millions of customers they serve is not represented by any party to this action, EEI seeks this Court's permission to represent this interest through the attached brief.

The holding below would impose substantial new administrative burdens upon the NRC by requiring the NRC to hold hearings prior to acting on requests for amendments to operating licenses which the NRC has determined involve no significant hazards consideration. The NRC's compliance with these requirements would increase the burdens on the licensees involved in obtaining license amendments which involve no significant hazards consideration. More significantly, nuclear power plants might have to shut down or a scheduled shutdown might be prolonged pending completion of the hearing mandated by the Court of Appeals' decision even though such a hearing will provide little offsetting benefit to public health and safety. In addition, in order to hold the required hearings the NRC would have to divert limited administrative and staff resources from other proceedings involving more significant issues. This would in turn delay those proceedings and increase, without commensurate public benefit, the time and expense of obtaining construction permits, operating licenses and significant amendments to operating licenses and subject consumers of electricity across the nation to potential billions of dollars of additional costs resulting from additional delays.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The attached brief *amicus curiae* sets forth detailed factual information regarding the administration of the NRC licensing process to provide a

broader perspective for this case and to demonstrate that the Court of Appeals' decision improperly imposes substantial and unjustified procedural requirements upon the NRC.

CONCLUSION

For the reasons set forth above, and in the attached brief, EEI urges this Court to grant its Motion for Leave to File the attached brief as *amicus curiae.*

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitioners, the United States Nuclear Regulatory Commission ("NRC") and the United States of America ("Government Petitioners") and the Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petitioners"), in this case. Petitioners and EEI urge this Court to reverse a holding of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that the NRC must hold a prior hearing on any nuclear power plant operating license amendment upon the request of an interested party even though the amendment has been determined by NRC to involve no significant hazards consideration. Utility Pet. for Certiorari, App.C.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent of the nation's electricity users. EEI's member companies include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the NRC or for which applications for construction permits are pending. As discussed in the foregoing Motion for Leave to File, the decision of the Court of Appeals concerns matters of vital importance to EEI and its members regarding the efficient and practical administration of NRC's regulation of the construction and operation of nuclear power plants.

SUMMARY OF ARGUMENT

1. The Atomic Energy Act imposes extensive administrative responsibilities upon the NRC to require the safe construction and operation of nuclear power plants. Before the NRC can approve construction of a nuclear power plant it must conduct an adjudicatory hearing which thoroughly investigates all necessary considerations, including health and safety issues, and must separately analyze the environmental impacts of the proposed plant. The NRC must conduct an additional hearing prior to approval of an operating license for a nuclear power plant, if requested. Thus, by the time an operating license is issued, the NRC will have thoroughly considered all relevant health and safety considerations raised by interested parties.

An operating license is a complex document which sets forth many detailed terms, conditions and specifica-

tions which frequently require modification. The NRC expects to complete action on 2,500 license amendments in fiscal 1981. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Upon request, the NRC will hold hearings prior to approval of significant amendments to operating licenses.

Before the decision of the Court of Appeals, the NRC approved without a prior hearing license amendments which it determined involved no significant hazards consideration, provided that notice of approval was published in the *Federal Register*. The public was permitted to request a hearing subsequent to such approval. In making the decision which amendments qualified for such treatment the NRC was guided by several criteria developed during years of consistent administrative practice.

The average time necessary to obtain a construction permit or operating license is over three years. The record developed during initial hearings addresses numerous complex technical issues and is extremely large. NRC's Atomic Safety and Licensing Board Panel, which hears and resolves the issues raised at these hearings, is understaffed and is straining its resources to consider the 42 proceedings the NRC anticipates will be heard this year. It will be unable to handle properly a significant number of new cases.

The NRC has on the average approved approximately 400 license amendments with no significant hazards consideration during each of the past four years. If hearings are held as a result of the decision below for only a small proportion of these amendments, the entire NRC hearing process could be disrupted and delays as long as nine months for each such license amendment could occur. This could force or

prolong many plant shutdowns. The additional staff responsibilities could also delay hearings which consider significant issues regarding construction permits, operating licenses and significant license amendments. The shutdown of nuclear power plants would require the expenditure of hundreds of thousands of dollars per day per plant for replacement power and the incremental cost of such power would be borne eventually by consumers throughout the country.

The opinion below thus threatens to disrupt substantially the NRC's ability to carry out important statutory responsibilities and to increase the cost of power throughout the country with little commensurate benefit to public health and safety.

2. The Court of Appeals adopted an admittedly "paradoxical" construction of Section 189(a) of the Atomic Energy Act, as amended. This contravenes the fundamental rule that anamolous or absurd statutory construction is to be avoided. *In Re Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978).

Any potential question regarding the meaning of Section 189(a) is resolved by its legislative history and the Commission's longstanding interpretation. The relevant language of Section 189(a) had been adopted in 1962 shortly after the Commission implemented, first by adjudication and then by rulemaking, a procedure which permitted the staff to identify and approve insignificant license amendments without prior notice or hearing. *General Electric Co., (Vallecitos Boiling Water Reactor)* 1 A.E.C. 541 (1960); 27 *Fed. Reg.* 5491 (June 9, 1962). The Joint Committee Report regarding the 1962 amendments demonstrates congressional awareness of the Commission's regulation expediting the approval of insignificant amendments, with no express or implied

rejection of this approach. S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). The Report also emphasizes the goal of expediting the licensing process. *Id.* Accordingly, it is reasonable to conclude that Congress intended to affirm the Commission's practice of screening out insignificant cases from those eligible for a prior hearing. The legislative history certainly does not show that Congress expressly intended a "paradoxical" statutory scheme that would be either ineffective or favor those few with preferential access to the Commission.

Moreover, within a few months after the passage of these amendments the Commission adopted regulations which reaffirmed its prior procedure for approval of insignificant license amendments. 27 *Fed. Reg.* 12184 (December 8, 1962). The procedures established in these regulations had been in effect for almost 20 years prior to the decision below. Such contemporaneous and longstanding interpretation deserves considerable deference from this Court. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.,* _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981).

Since the Court of Appeals' interpretation of Section 189(a) is erroneous, and since that Court may not impose procedural requirements upon the Commission in excess of the *minima* required by statute, its decision must be reversed.

ARGUMENT

A. THE COURT OF APPEALS' DECISION IMPOSES PROCEDURES WHICH WILL DELAY SUBSTANTIALLY THE NRC's ADMINISTRATIVE PROCESS WITHOUT COMMENSURATE JUSTIFICATION.

In order to assist this Court in its review of the decision of the Court of Appeals, it is helpful to reiterate the procedures the NRC currently applies in regulating nuclear power plant construction and operation. These procedures were succinctly described by this Court in its decision in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526-527 (1978):

> Under the Atomic Energy Act of 1954 . . . as amended . . . the Atomic Energy Commission[2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. . . . In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. . . . This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application. . . .[3] The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA) . . . and prepares a draft environmental impact statement, which, after being circulated for comment . . . is revised and becomes

a final environmental impact statement. . . . Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing . . . and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. . . . The final agency decision may be appealed to the courts of appeals. . . . The same sort of process occurs when the utility applies for a license to operate the plant . . . except that a hearing need only be held in contested cases and may be limited to the matters in controversy.[5] (citations and footnote omitted)

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[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974. . . . Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards."

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. . . . The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit.

Thus, by the time an operating license is issued, the NRC will have held at least one adjudicatory hearing and may have held a second hearing addressing public health and safety issues relevant to constructing and operating a particular nuclear power plant.

The operating license is a complex document containing detailed terms, conditions and technical specifications which can run to hundreds of pages in a

typical license. Utility Pet. for Certiorari, App. F at 62a, Boyd Aff. para. 4. Because of their technical detail and scope, operating licenses and technical specifications frequently require modification. Any change to an operating license including technical specifications, no matter how minor, requires an amendment to the operating license. 10 C.F.R. §50.59(a)(1)(c).

Under Section 189(a) of the Act, 42 U.S.C. §2239(a), license amendments which involve significant new hazards consideration may be granted without a hearing following thirty days notice in the *Federal Register.*[1] If a hearing is requested, however, it must be held prior to approval of such amendments. *Id.* Prior to the decision of the Court of Appeals below, the NRC had interpreted Section 189(a) to provide that a license amendment which it determined involved no significant hazards consideration could be approved without a prior hearing (10 C.F.R. §50.58(b)) and simply published notice of approval in the *Federal Register.* The NRC had stated that it retains administrative discretion to provide a hearing before acting on such amendments. 45 *Fed. Reg.* 20491, 20492 (March 28, 1980). Members of the public who requested a hearing would have received one after approval of the amendment. Government Pet. for Certiorari at 16.

The NRC is currently proposing to amend its regulations to specify criteria to be used to determine whether a license amendment involves no significant hazards consideration. 45 *Fed. Reg.* 20491. This proposal indicates that in the past the NRC staff was guided by the following examples of amendments that

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[1] Section 189(a) is set forth in page 2 of the Petition for a Writ of Certiorari of the Utility Petitioners.

were not likely to involve significant hazards consideration (*id.* at 20492):

(i) A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations.

(viii) An extension of the date, in a construction permit, for the completion of construction.

Under these examples, operating licenses were routinely amended whenever a nuclear power plant changed its fuel supply to accommodate minor technical differences in fuel characteristics and to enable a plant to conform to new regulations, such as those the NRC recently promulgated imposing additional fire safety measures (45 *Fed. Reg.* 76602 (November 19, 1980)). Other examples of no significant hazards consideration amendments are identified in our Brief *Amicus Curiae* In Support of A Petition for a Writ of Certiorari. EEI Brief *Amicus Curiae* Re Pet. for Certiorari at 6.

The NRC Notice of Proposed Rulemaking also identifies the following examples as license amendments the staff has considered likely to involve significant hazards consideration (45 *Fed. Reg.* 20492):

(i) A significant relaxation of the criteria used to establish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.

(iv) Renewal of an operating license.

(v) For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.

(vi) A change to technical specifications involving a significant unreviewed safety question.

NRC has regularly provided notice and an opportunity for a public hearing prior to approval of these and similar amendments.

The procedures for granting construction permits, operating licenses and amendments to operating licenses impose substantial administrative responsibilities upon the NRC. As this Court noted in *Vermont Yankee,* each adjudicatory hearing is conducted by a three-member board of the Atomic Safety and Licensing Board Panel ("ASLBP"). 42 U.S.C. §2241. As of September 30, 1980, the ASLBP consisted of 52 individuals, only 13 of whom are permanent members. Nuclear Regulatory Commission, *1980 Annual Report* at 234. These members include 17 lawyers, 17 environmental scientists, 10 engineers, 6 physicists, 1 economist and 1 chemist. *Id.* According to the Commission, a board generally consists of a lawyer-chairman, a nuclear engineer or reactor physicist and an environmental scientist. *Id.* A hearing before a board is generally divided into two separate phases, one to consider health, safety, common defense and security issues and the other to consider en-

vironmental factors. 10 C.F.R. §2761a. Separate decisions may be issued for each phase. *Id.* In addition, antitrust issues are heard and decided by a separate board.

As of December 31, 1980, there were 68 nuclear plants licensed to operate, 82 plants with construction permits, 2 plants licensed for low power operations and 11 plants under review for construction permits. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Construction permit hearings must be held for the 11 plants under review for construction permits and licensing hearings would be held, if requested, prior to issuance of operating licenses for these plants and the additional 84 plants with construction permits or low power licenses. License amendments will be filed on a frequent basis for all plants in operation. During fiscal 1980 approximately 1,900 amendments to operating licenses were reviewed and processed. Nuclear Regulatory Commission, *1980 Annual Report* at 5. NRC expects to complete 2,500 such actions in fiscal 1981. *Id.*

According to the Chief Administrative Judge of the Atomic Safety Licensing Board Panel, as of February 25, 1981, the ASLBP reported 62 active proceedings on its docket of which 42 could go to hearing within a year. *Energy and Water Development Appropriations for 1982*: Hearings before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. 883 (1981) (Memorandum to Commissioners of the NRC from B. Paul Cotter, Jr., Chief Administrative Judge, ASLBP (February 25, 1981)) (hereafter *Appropriations Hearings*). The Department of Energy estimates that it takes eleven years from initial planning until commercial operation of a nuclear power plant. Department of Energy, Energy Information Administration, *Nuclear Power Regulation* at 6 (May 1980). The complexity of the licensing process is a major

factor in this long lead time. The average time between applying for a construction permit and the initial decision by the ASLBP board is in excess of three years. *Id.* The time necessary for granting an operating license takes another three years or more. *Id.* The length of this process is caused by several factors including the presence of many parties, the difficulty of scheduling hearings to accommodate ASLBP members and interested parties, and the complexity of the issues involved. One recent case, involving Pilgrim Nuclear Power Station, Unit 2, required 66 days of hearings during which 12,000 pages of testimony, often involving very complex issues, and 128 exhibits, several hundred pages long, were obtained. *Appropriations Hearings* at 886. The briefs and proposed findings of the parties totalled 800 more pages. *Id.* The board was required to review and reach a decision on 56 issues and contentions raised during this process. *Id.* at 887. It held 12 conferences over 20 days to discuss these issues and required substantial additional time to study, summarize and index the record and write an opinion. *Id.* at 888-889. Conferences and drafting of an opinion are often delayed because board members are hearing other cases while a decision in one case is being prepared. *Id.* at 889. The Chief Administrative Judge concluded that the ASLBP is presently understaffed (*id.* at 886) and does not have adequate resources to handle properly any significant number of new cases (*id.* at 893).

Since staff resources are already strained and contribute to delays in the scheduling and resolution of hearings, the addition of a significant number of hearings on no significant hazards consideration amendments would cause substantial additional delays. The extent to which the Court of Appeals' decision will

stimulate such hearings is, of course, still speculative. Nevertheless, the potential for additional hearings is obvious. In the past four years the NRC has approved more than 1600 operating license amendments that it determined raised no significant hazards consideration. Government Pet. for Certiorari at 15. As the statement of four judges of the Court of Appeals objecting to denial of rehearing *en banc* points out (Utility Pet. for Certiorari, App. A at 13a), under the decision of the Court of Appeals below, "almost any expression of interest" in the licensing and operation of a nuclear power plant by a member of the public constitutes a "request" for a hearing and "the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment." Consequently, where continuing interest exists, the NRC may feel required to schedule hearings even though no formal request has been made. At any rate, a simple request from an interested party would necessitate a hearing before such an amendment is approved.

By one estimate the expected delay in processing a no significant hazards consideration operating license amendment attributable to a *Sholly* hearing would be at least nine months. Utility Pet. for Certiorari at 15. Depending on the nature of the amendment, such delay on an amendment determined to involve no significant hazards consideration could force an operating plant to shut down, prolong the scheduled shutdown of a plant or force it to operate at reduced power for months. The NRC has stated to Congress that "[o]ver the past few months some 20 of the nation's 72 nuclear power plants would either have had to shut down or operate at reduced power if they had not been accorded the authority sought in license amendment requests that involved no significant hazards considerations." *Appropriations Hearings* at 1110 (Response to Questions

Submitted to NRC). The additional staff responsibilities for hearings on such amendments could also delay consideration of construction permits, operating licenses and significant amendments as well. The NRC has predicted that the decision of the Court of Appeals raises "the prospect of a substantial curtailment of nuclear power plant operations for reasons which, in the Commission's view, are unrelated to the safety of the nuclear power plants." *Id.*

While absolute quantification of the impact of the Court of Appeals' decision on delays in the NRC licensing process is not feasible at this time, there should be little doubt that the financial costs upon electric utilities and their customers will be very large. The Department of Energy ("DOE") recently stated that the incremental cost of replacing nuclear power generation lost by reasons of licensing delays varies anywhere from $100,000 to $750,000 per day. U.S. Department of Energy, Office of Nuclear Reactor Programs, *Update, Nuclear Power Program Information and Data* 60 (January/February 1981). This variation exists because companies which can obtain substitute electricity generated from expensive oil generally experience higher replacement costs than those firms which rely upon coal as their replacement fuel. Based upon recent operating experience, DOE concluded that the average financial penalty of shutting down a 1000 megawatt nuclear plant is $500,000 per day. *Id.* It concluded "[t]his is a significant sum for the consumer, particularly when the nuclear unit in question represents a large portion of the utility's generating capacity and all or most of the incremental cost is passed along to the consumer in a fuel or energy adjustment charge. The magnitude of the loss constitutes a potent argument for not delaying the startup of a nuclear unit once it is ready to operate safely and reliably." *Id.*

Any delays resulting from the Court of Appeals' decision would be in addition to those already being experienced for other reasons. For example, a DOE study of NRC licensing delays and resultant costs for 12 nuclear units owned by only a few of EEI's members estimates that even after recent NRC actions to expedite the licensing process are taken into account, there will be 51 months of delay in licensing of those units with a total direct cost of over $1 billion. Department of Energy, Division of Power Supply and Reliability, *Estimates of The Costs of Delaying Operating Licenses for Nuclear Plants* 1 (May 15, 1981). If, as a consequence of the Court of Appeals' decision, prior hearings are required for license amendments involving no significant hazards consideration, the aggregate potential delays and resultant costs for all nuclear plants owned by EEI members and for the customers they serve would be greatly increased.

B. THE COURT OF APPEALS MISINTERPRETED THE REQUIREMENTS OF SECTION 189(a) AND THE INTENT OF CONGRESS.

The decision of the Court of Appeals in this case overturned a longstanding interpretation by the Atomic Energy Commission ("the Commission")[2] of Section 189(a) of the Atomic Energy Act, as amended in 1962, Pub. L. 87-615, 76 Stat. 409 (1962), in order to implement an admittedly "paradoxical" interpretation of that provision. Utility Pet. for Certiorari, App. C at 35a n.20. Any question regarding the meaning of this provision is resolved by the legislative history of the 1962

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[2] The Atomic Energy Commission was predecessor to the Nuclear Regulatory Commission, which now has the responsibility of regulating nuclear facilities. 42 U.S.C. §5841.

amendments and related Commission actions which demonstrate that no basis exists for the interpretation adopted by the Court of Appeals.

Prior to 1960 the Commission construed Section 189(a) of the Atomic Energy Act to require hearings before approval of construction permits, operating licenses and amendments to construction permits and operating licenses. 42 U.S.C. §2239(a) (1958 ed.). By 1960 the hearing requirement had led to such delays in the administration of the amendment process that the Commission "recognize[d] the need for [an] expeditious change [*i.e.*, amendment] procedure consistent with its statutory responsibility with respect to public health and safety." Memorandum Opinion and Order of August 18, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18. Therefore, in the *Vallecitos* proceeding the Commission authorized the staff to approve a license amendment without a hearing if it "can make a finding that the proposed test or experiment presents no significant new hazards consideration." Memorandum Opinion and Order of November 2, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18, 1 A.E.C. 541 (1960).[3]

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[3] The license amendment itself read (1 A.E.C. 543):

"If the Director, Division of Licensing and Regulation determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the application, he may authorize the change, test or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. A copy of the authorization must be filed in the record of the proceeding."

Shortly thereafter, a 1961 report of the staff of the Joint Committee on Atomic Energy which reviewed and made recommendations on improving the AEC regulatory process, approved of the *Vallecitos* approach and characterized it as a "step forward" in the administration of license amendment procedures. Joint Committee on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process,* Vol. I, 37 (1961). In the context of describing functions for a recommended Atomic Safety and Licensing Board, which would determine whether license amendments raised significant hazards consideration, the report stated: "[t]he handling of changes would be facilitated if the Commission's recent order in the Vallecitos case could be broadened by statute or regulation to a general rule." *Id.* at 73 n.4.

In 1961, the Commission, acting in accordance with the Joint Committee recommendation, proposed to amend its regulations to adopt the *Vallecitos* approach of permitting the staff to approve no significant hazards consideration amendments summarily and provided the public an opportunity to comment upon the proposal. 26 *Fed. Reg.* 3930 (April 8, 1961). The Commission subsequently adopted this proposal by amending its regulations. 27 *Fed. Reg.* 5491, 5492 (June 9, 1962), codified at 10 C.F.R. §50.59(e)(2).[4]

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[4] This section read in pertinent part: "[i]f the Commission determines that the proposed change, test or experiment *does not present significant hazards considerations* not described or implicit in the hazards summary report, it may authorize such change, test or experiment, without referral to the Advisory Committee on Reactor Safeguards for a report *and without a prior public hearing*, upon finding that there is reasonable assurance that the health and safety of the public will not be endangered." 10 C.F.R. §50.59(e)(2), 27 *Fed. Reg.* at 5493 (emphasis added).

The preamble to the final rule noted that the Commission planned to delegate authority to the staff to determine whether a proposed change involved a significant hazards consideration. 27 *Fed. Reg.* at 5492. Where it did not, such change was authorized without a prior public hearing. *Id.* The Commission noted that "[t]he revisions for §§50.36 and 50.59 are based upon the provisions incorporated in License No. DPR-1 pursuant to the Commission's Memorandum and Order dated November 2, 1960 (*in the matter of General Electric, Vallecitos Boiling Water Reactor,* Docket No. 50-18)." *Id.*

The 1962 amendments to Section 189(a) were adopted on August 29, 1962, two months after the Commission's codification of the *Vallecitos* approach in its regulations. Pub.L. 87-615, 76 Stat. 409 (1962). These amendments resulted in large part from the recommendations of the Joint Committee Report, *Improving the AEC Regulatory Process*, that measures be taken to reduce delays in the administrative process. The Joint Committee Report on the amendments stated that "[t]he staff study also recommended a number of procedural changes designed to decrease the number of hearings and referrals to the Advisory Committee on Reactor Safeguards." S. Rep. No. 1677, 87th Cong., 2d Sess. 2 (1962).[5] The Joint Committee Report also indicated that the amendments to Section 189(a) were intended to "relax" the mandatory hearing requirement and, in the only section of the Report which refers to the

[5] Since the Joint Committee on Atomic Energy reported these amendments, the House Report is identical with the Senate Report. *See*, H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962).

AEC regulations codifying the *Vallecitos* approach, summarized their requirements:

> Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59. Id.* at 8 (emphasis added).

As we have indicated, "AEC Regulation 50.59" provided that a license amendment which "does not present significant hazards consideration" may be approved "without a prior public hearing." 10 C.F.R. §50.59(e)(2), 27 *Fed. Reg.* 5493. The Joint Committee Report discussion demonstrates congressional awareness of the regulation codifying the *Vallecitos* approach. Moreover, the Report, which does not suggest any implied or express rejection of this approach, emphasizes the goal of expediting the hearing process which is furthered by the *Vallecitos* approach.

This Court's responsibility is to interpret the words of the Act in light of purposes Congress sought to serve. *Chapman* v. *Houston Welfare Rights Organization,* _____ U.S. _____, 99 S.Ct. 1905, 1911 (1979). Here, it is reasonable to conclude on the basis of the legislative history that the congressional goal of expediting the hearing process would be furthered if the Commission were permitted to screen out insignificant cases from

those eligible for a prior hearing.[6] Such a construction is completely consistent with the 1962 amendments and their legislative history.

In addition, construction of a statute which would produce an anomalous or absurd result is to be avoided. *In Re Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). The interpretation of Section 189(a), as amended, by the Court of Appeals leads to an absurd result. Even that Court conceded "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" and concluded that its interpretation of the statute produces a "paradoxical" result. Utility Pet. for Certiorari, App. C at 35a n.20. This statutory scheme would either be ineffective or at most would be utilized by those select few with preferential access to the Commission. Since the legislative history does not show that Congress intended such a "paradoxical" and absurd statutory scheme, the Court of Appeals' interpretation should be reversed by this Court.

Within a few months after passage of the 1962 amendments the Commission proposed regulations to

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[6] This Court has often recognized that even when a statute requires a "hearing" or "opportunity for a hearing" it is reasonable for administrative agencies to establish criteria which screen out insignificant cases in order to administer their statutory responsibilities more efficiently and to focus available resources on priority concerns. *Costle* v. *Pacific Legal Foundation*, _____ U.S. _____, 100 S.Ct. 1095, 1106 (1980); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620 (1973); *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The fact that the screening procedure at issue in this case differs in some respects from those adopted by other agencies in no way detracts from the reasonableness of adopting screening procedures to facilitate efficient agency administration.

implement those amendments. 27 *Fed. Reg.* 10706 (November 2, 1962). In the preamble to the proposed regulations the Commission gave its contemporaneous interpretation of the congressional amendments to the Act:

> Public Law 87-615 of the 87th Congress, which became law on August 29, 1962, adopted certain amendments of the Atomic Energy Act of 1954 designed to permit greater flexibility and to encourage informality in the conduct of licensing proceedings conducted by the AEC.
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> * * *
>
> Section 2 of Public Law 87-615 amended subsection 189(a) of the Atomic Energy Act, which previously required a public hearing prior to granting a construction permit as well as prior to granting an operating license for a power or testing reactor, by limiting the mandatory hearing requirement to the construction permit stage. The amended subsection 189(a) now authorizes the Commission also to dispense with advance public notice with respect to an amendment of a construction permit or an operating license on determining that the amendment involves no significant hazards considerations, and in other cases to issue an operating license or amendment to a construction permit or operating license without a hearing but on public notice of its intent to do so. *Id.* at 10706.

The proposed regulations incorporated in a new Section 50.58(b) of the Commission's regulations that a no significant hazards consideration amendment would be approved without prior notice and publication. *Id.* at 10707. The public, including members of Congress, had an opportunity to contest this interpretation during the comment period, but the Commission's preamble to the final regulations does not contain any mention of critical

comments. 27 *Fed. Reg.* 12184 (December 8, 1962). The proposed rules were promulgated as final regulations and the Commission staff continued to approve insignificant license amendments without prior notice or hearing. *Id.* Accordingly, the Commission has twice conducted rulemakings on this subject; Congress was aware of the Commission's initial rule when it amended Section 189(a) in 1962 and the Commission's subsequent rulemaking clearly affirmed the procedures it had adopted earlier.

Those regulations had remained in effect for almost 20 years until this case arose. As the agency charged with the administration of the Act, the Commission is entitled to considerable deference. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978). In addition, the Commission's contemporaneous construction of the amendments deserves special deference because it remained consistent over such a long period of time. *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.*, _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981). The fact that Congress made no attempt to modify the Commission's interpretation, despite numerous opportunities offered by oversight hearings, subsequent amendments to the Atomic Energy Act, and other congressional review mechanisms, further confirms that the Commission's construction and application of Section 189(a) is consistent with the intent of Congress.

The applicable rules of statutory construction and the history and implementation of Section 189(a), as amended, thus demonstrate that the Court of Appeals' interpretation of that provision is erroneous. Since that

Court may not alternatively impose additional procedural requirements upon the Commission in excess of the *minima* required by statute, *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra.* at 543, its decision must be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully requests this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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